



November 2, 2000

Ms. Elizabeth Lutton, Senior Attorney
City of Arlington-Mail Stop 03-0100
501 West Main Street
Arlington, Texas 76010

OR2000-4288

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140817.

The Arlington Police Department (the "department") received a request for the following information:

- (1) Case numbers and records on all offenses categorized as official oppression that occurred between 1980 and 2000 at 620 W. Division Street in Arlington.
- (2) Case numbers and records on all offenses categorized as sexual assaults and/or rape alleged to have been committed by Arlington jail staff, inmates, peace officers and/or Arlington police department personnel between 1980 and 2000.
- (3) Records on an internal investigation conducted in 1998 into alleged criminal wrongdoing by Arlington jailers.
- (4) Records of all internal affairs investigations of peace officers and/or jailers involved in offenses categorized as official oppression, sexual assault and/or rape between 1980 and 2000.

You state that you will release some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 55.108, 552.117, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

You state that you do not have any records responsive to request item one. The Public Information Act (the "Act") only applies to information in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision No. 561 (1990). However, a governmental body must make a good faith effort to relate a request for information to information which it holds. *Id.* Based on your representation that you have no records responsive to request item one, you need not comply with request item one.

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). Although you have submitted information responsive to request items three and four, you have not provided this office with the requested information or representative samples of all of the information responsive to request item two.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You assert that the information is excepted under

¹We note that in a letter dated November 2, 2000 you informed this office that litigation had concluded and, therefore, section 552.103 was no longer applicable to the submitted information. However, you continue to assert the other exceptions to public disclosure.

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

section 552.108. Section 552.108 is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Act can be waived). You also assert that the information responsive to request item two would constitute criminal history record information ("CHRI") which is excepted under section 552.101. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

You assert that information responsive to request item two "as worded" would amount to CHRI. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. In instances where a requestor asks for all arrest reports or offense reports pertaining to a specified individual, responsive information would amount to a compilation of an individual's CHRI which implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this request, the requestor does not ask for all case numbers and records of a specified individual but rather requests information relating to a specified offense alleged to have been committed by a broad category of persons. Therefore, we do not believe that the request "as worded" implicates an individual's right to privacy. Thus, certain information responsive to the request, such as case numbers and offense reports, would not constitute CHRI and may not be withheld under section 552.101.

We note that you state that some offense records in personnel files would be releasable to the requestor. You further state that these offense records can only be located by a manual search of all personnel files. However, the fact that it may be burdensome to provide the information does not relieve a governmental body of its responsibility to comply with the Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (1976), *cert. denied*, 430 U.S. 931 (1977) (cost or difficulty in complying with act does not determine availability of information), Open Records Decision No. 497 (1988). Further, you also state that inmate information contained in jail blotters would be releasable. You state that an estimate of the charges will be prepared and submitted to the requestor before the search is undertaken. *See* Gov't Code § 552.2615 (providing that requestor be given an itemized estimate of charges if cost of providing information exceeds \$40).

You also assert that, to the extent these offense records contain allegations of sexual harassment and sexual assault, the records should be excepted under section 552.101. We note that only sexual assault and rape offenses are responsive to request item two. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing

facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* Any information tending to identify sexual assault victims should be withheld pursuant to common-law privacy. *See* Open Records Decision No. 339 (1982) Therefore, you must withhold any identifying information of any sexual assault victims.

You also argue that responsive information in Exhibit 6 is excepted under section 552.101 in conjunction with state and federal statutes. Section 552.101 also encompasses information protected by statute. CHRI generated by the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Thus, the department must withhold the CHRI in Exhibit 6.

With regard to request item two, we do not believe that information responsive to the request "as worded" would constitute CHRI and, therefore, you must release any information that is responsive to request item two including offense documents in personnel files and jail blotters upon the requestor's acceptance of the estimated charges. *See* Gov't Code § 552.2615. However, CHRI generated by NCIC, TCIC, or DPS, such as in Exhibit 6, must be withheld under section 552.101.

Further, you assert that the information in Exhibits 2 and 4, which are responsive to request item three and four, are excepted under section 552.101 in conjunction with common law right of privacy. *Industrial Found.*, 540 S.W.2d at 683-85. Although information relating to an internal investigation of sexual harassment claims involving public employees may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. Open Records Decision No. 444 (1986). The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso

1992, writ denied). The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In conclusion, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on *Ellen*, a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a victim or witness.

The submitted information in Exhibits 2 and 4 consists of three internal affairs investigations pertaining to allegations that officers or jailers committed the offense of official oppression by intentionally subjecting another to sexual harassment. *See* Penal Code § 39.03. After reviewing the submitted investigations, we have marked three documents which appear to be analogous to the summary in *Ellen* and must be released. Further, you must also release the accused's statement in one of the investigations which we have marked. However, you must withhold the identity of the victims and witnesses, other than the accused, from the summaries and the accused's statement. We also note that one of the summaries contains polygraph results. Section 1703.306 of the Occupations Code provides:

A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person may not disclose information acquired from a polygraph examination to another person

Occ. Code § 1703.306. While section 1703.306 provides various exceptions to confidentiality, none of the exceptions applies here. Accordingly, the department must withhold the marked polygraph results under section 1703.306 as encompassed by section 552.101 of the Government Code. We have marked the information which you must withhold from the summaries and the accused's statement.³ You must withhold the remaining submitted information in Exhibits 2 and 4 under section 552.101 of the Government Code.⁴

³We note that we are unable to mark a portion of one of the summaries because the print is unreadable. Therefore, you must withhold the identity of the victim or witnesses in this portion of the summary.

⁴Because you must withhold most of the information in Exhibit 2, we need not address the applicability of section 552.117.

You also assert that Exhibit 5, an internal affairs investigation which pertains to allegations of sexual assault of a child, must be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Section 261.201(a) of the Family Code provides that:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

After reviewing the submitted information, we conclude that the information in Exhibit 5 is the type of information that is excepted under section 261.201 of the Family Code. Because you have not cited any specific rule that the department has adopted with regard to the release of this type of information, we assume that no such regulation exists. Therefore, we conclude that Exhibit 5 is confidential under section 261.201 of the Family Code and must be withheld. *See Open Records Decision No. 440 at 2 (1986) (construing predecessor statute).*

You also contend that driver's license numbers and vehicle tag numbers in Exhibit 6 are protected from disclosure. Section 552.130(a) of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold driver's license numbers, license plate numbers, and VIN numbers under section 552.130(a) of the Government Code.

In conclusion, you need not respond to request item one if no responsive information exists. With regard to request item two, you must release responsive information with the exception of CHRI generated by NCIC, TCIC, or DPS which must be withheld under section 552.101 of the Government Code and the identity of sexual assault victims which must be withheld under section 552.101 and common law privacy. You must release the marked summaries and the accused's statement in Exhibits 2 and 4 but you must redact the identities of victims and witnesses to the alleged sexual harassment from the released information and withhold the remaining information in Exhibits 2 and 4 under section 552.101 and common law privacy. Further, you must withhold polygraph results in Exhibit 4 under section 552.101 in

conjunction with section 1703.306 of the Occupations Code. You must also withhold the information in Exhibit 5 under section 552.101 in conjunction with section 261.201 of the Family Code. The department must withhold information excepted by section 552.130 of the Government Code. You must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

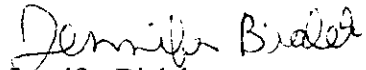
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 140817

Encl: Marked documents

cc: Ms. Rachel Horton
Arlington Morning News
1112 Copeland Road, Suite 400
Arlington, Texas 76011
(w/o enclosures)